

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:)	
REDIE LEWIS)	Case No. 03-41515
)	
Debtor.)	
_____)	
)	
REDIE LEWIS)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-7068
)	
OPTION ONE MORTGAGE INC.,)	
et al.)	
)	
Defendant.)	
_____)	

**MEMORANDUM AND ORDER DENYING MOTION TO ABSTAIN,
AND CONTINUING STAY ORDER**

This matter is before the Court on Option One Mortgage Corp.’s Motion to Abstain from Hearing and to Dismiss Debtor’s Adversary Case as a Non-Core Proceeding (Doc. 61) and Miller Enterprises, Inc. and Jeffrey Miller’s Motion to Abstain from Hearing and to Dismiss Debtor’s Adversary Case (Doc. 89), which joins the motion filed by Option One Mortgage Corp. The Plaintiff, Redie Lewis, has filed a memorandum in opposition to the motion to abstain (Doc. 106). The Court has reviewed the parties’ respective pleadings and is now prepared to rule.

Option One Mortgage Corp. filed this motion asking the Court to abstain from hearing this case on the basis that it is not a core proceeding under the Bankruptcy Code. Plaintiff, Redie Lewis, (“Lewis”) contends that this adversary proceeding is a core proceeding, and, even if it is not, that the Court still has

jurisdiction to hear the case, as it relates to the bankruptcy case. For the reasons set forth below, the Court denies Option One's motion on the basis that this is a "related to" proceeding, over which this Court does have jurisdiction.

I. FACTUAL BACKGROUND

Lewis filed her Chapter 13 bankruptcy petition on May 30, 2003, and she filed this adversary proceeding on August 4, 2003. On November 25, 2003, Lewis filed an Amended Complaint naming BNC Mortgage, Inc. ("BNC"), Option One Mortgage Corp. ("Option One"), First Union National Bank ("First Union"), Kozeny & McCubbin, L.C. ("McCubbin"), Miller Enterprises, Inc. ("Miller Enterprises"), Jeffrey Miller, Adamson & Associates, Inc. ("Adamson"), and Maplewood Mortgage, Inc. ("Maplewood") as defendants in five causes of action including negligence, violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act, Fraud and Misrepresentation, violations of the Truth In Lending Act (TILA) and discrimination.

All the claims in this proceeding involve some aspect of the construction, purchase, financing or foreclosure of the Debtor's home. The Debtor's negligence cause of action is based upon the purported actions of First Union and McCubbin during the foreclosure proceedings in Johnson County District Court. The RICO claim apparently involves all of the Defendants except for McCubbin, and involves several aspects of the purchase and foreclosure of Lewis' home. The Debtor's "Fraud and Misrepresentation" claim seeks damages against Jeffrey Miller, Miller Enterprises, Maplewood and Adamson relating to the construction of her home. The TILA cause of action against only BNC and First Union relates to the financing of the purchase of the home. Finally, the discrimination claim is brought against BNC, Miller Enterprises, Jeffrey Miller, First Union and Option One and relates to the purchase of the home.

The Debtor has claimed her home as exempt under Kansas' homestead exemption. Her Chapter 13 Plan indicates that the amount of the mortgage on the house is in dispute, presumably based upon this adversary proceeding.

II. CONCLUSIONS OF LAW

The moving creditors claim that this Court should abstain from hearing this case pursuant to 28 U.S.C. §§ 157 and 1334.

A. The Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 157.

The movants claim that the Court lacks jurisdiction to hear the claims brought in this adversary proceeding because it is not a core proceeding under 28 U.S.C. § 157. Section 157 authorizes district courts to refer cases arising under the Bankruptcy Code (Chapter 11 of the United States Code), as well as matters related to cases arising under the Bankruptcy Code, to the Bankruptcy Court for adjudication.¹ For the reasons set forth below, the Court finds that it has jurisdiction to hear this case as it is related to the Debtor's bankruptcy proceeding.

1. This case is not a core proceeding.

If a proceeding involves a right created by bankruptcy law, or is one that would only arise in a bankruptcy case, it is a core proceeding.² "Core proceedings are proceedings which have no existence outside of bankruptcy."³ "Actions which do not depend on the bankruptcy laws for their existence and

¹28 U.S.C. § 157(a).

²*Matter of Wood*, 825 F.2d 90, 97(5th Cir. 1987).

³*In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990) (citing *In re Alexander*, 49 B.R. 733, 736 (Bankr. D.N.D.1985))

which could proceed in another court are not core proceedings.”⁴ If a proceeding does not invoke substantive rights created by bankruptcy law and is one that could exist outside of bankruptcy, it is a non-core proceeding, even though it may be related to bankruptcy because of its potential effect on the estate.⁵ Section 157(b)(2) provides a non-exclusive list of proceedings that are considered core proceedings. The Debtor claims that the adversary proceeding is a core proceeding under § 157(b)(2)(E), (H), (K) and (L). The fact the Debtor’s claims could arguably fit within the literal wording of § 157(b)(2) does not conclude the Court’s jurisdictional analysis. Instead, the Court must analyze the claims to see if they fit within the definition of a core proceeding.⁶

The Court finds that the causes of action contained in the Amended Complaint are not core proceedings. The Debtor’s claim for negligence, violations of RICO, fraud, TILA violations and discrimination are all independent actions “which do not depend on the bankruptcy laws for their existence and which could proceed in another court.”⁷ If the Court were to adopt the Debtor’s extremely broad view of what constitutes a core proceeding, virtually every claim that seeks monetary damages would fall within the definition of a core proceeding. The Debtor’s attempt to frame the causes of action in a manner that would make them core proceedings under § 157(b)(2)(E), (H), (K) and (L) is rejected by the Court.

⁴*In re Gardner*, 913 F.2d at 1518 (citing *In re Wood*, 825 F.2d 90, 96 (5th Cir.1987).

⁵*Matter of Wood*, 825 F.2d at 93.

⁶*See Lacy v. F.D.I.C. (In re Lacy)*, 183 B.R. 890, 893 (Bankr. D. Colo. 1995).

⁷*See Gardner v. United States (In re Gardner)*, 913 F.2d at 1518.

2. This case is related to the Debtor's bankruptcy proceeding.

The Court's finding that this case is not a core proceeding does not deprive the Court of jurisdiction to hear the case. Bankruptcy courts have jurisdiction to hear non-core proceedings, provided they are related to the bankruptcy proceeding.⁸ The test for determining whether a matter is related to a bankruptcy proceeding is whether the outcome of the proceeding could conceivably have any effect on the estate.⁹

Numerous courts have analyzed whether certain types of actions are "related to" a bankruptcy proceeding. Courts have found pre-petition claims such as civil rights claims,¹⁰ employment discrimination claims,¹¹ fraud claims,¹² and actions to invalidate mortgages¹³ to be related to an underlying bankruptcy case on the basis that they could effect the bankruptcy case in some way. Like those courts, this Court finds that the Debtor's claims could conceivably have an effect on her Chapter 13 bankruptcy proceeding.

⁸28 U.S.C. § 157(c)(1).

⁹*Hunnicut Company, Inc. v. TJX Companies, Inc. (In re Ames Dept. Stores, Inc.)*, 190 B.R. 157, 161 (S.D.N.Y. 1995).

¹⁰*Vinci v. Town of Carmel (In re Vinci)*, 108 B.R. 439 (Bankr. S.D.N.Y. 1989) (holding that the debtor's civil rights claim is related to the debtor's bankruptcy proceeding because the outcome could have some effect on the bankruptcy proceeding).

¹¹*Richardson v. United Parcel Service*, 195 B.R. 737, 740 (E.D. Mo. 1996) (referring case to the bankruptcy court because the outcome of the case could have some effect on the debtor's bankruptcy proceeding).

¹²*Yukon Energy Corp. v. Brandon Investments, Inc. (In re Yukon Energy Corp.)*, 138 F.3d 1254 (8th Cir. 1998) (holding that bankruptcy court properly exercised non-core jurisdiction over debtor's fraud claim against a corporation and former board member).

¹³*Williams v. Heller Financial Services, Inc.*, 82 B.R. 823 (E.D. La. 1988) (holding that action seeking to invalidate mortgages, return of interest paid by debtor in possession, and for damages for wrongfully encumbering those properties was related to Chapter 11 bankruptcy case).

The outcome of this case could have a significant impact on the amount of money that can be distributed to creditors if she is successful.¹⁴ Because the Court finds the Debtor's claims could conceivably have some effect on the bankruptcy estate, the claims fall within the jurisdiction of the Court pursuant to § 157(c)(1).

B. Abstention is not appropriate in this case.

Having determined that the Court has jurisdiction to hear this case under § 157(c)(1), the Court must now decide whether it should, or must, abstain from hearing this case pursuant to 28 U.S.C. § 1334.

The moving creditors claim that “because Debtor’s Adversary is a non-core proceeding, the Bankruptcy Court does not have jurisdiction over the subject matter of the complaint and, therefore, must abstain from hearing the adversary and further, dismiss said proceeding in accordance with 28 U.S.C. §§ 1334(b) and 157(a) and (b).” As noted above, the claim that the Court lacks jurisdiction to hear non-core proceedings is completely without merit, as 28 U.S.C. § 157(c)(1) states “[a] bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.” In addition, the Court finds that movants’ claim that the Court must abstain from hearing this case under 28 U.S.C. § 1334(b) is similarly without merit.

For mandatory abstention under 28 U.S.C. § 1334(b) to apply, the proceeding must (1) be based upon a state law claim or cause of action; (2) lack a federal jurisdictional basis absent bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be

¹⁴See *Artra Group, Inc. v. Salomon Brothers Holding Group, Inc. (In re Emerald Acquisition Corp.)*, 170 B.R. 632, 640 (Bankr. N.D. Ill. 1994) (holding that a proceeding relates to bankruptcy if it affects the amount of property available for distribution or allocation of property among creditors).

a non-core proceeding.¹⁵ Every requirement of mandatory abstention provision must be met before the Court may abstain from hearing the proceeding pursuant to § 1334.¹⁶ Mandatory abstention should be narrowly construed and abstention exercised narrowly and cautiously.¹⁷ In addition to the above requirements, a motion for mandatory abstention must be timely filed.¹⁸

The Court finds that the moving creditors have failed to prove at least two of the required elements for abstention.¹⁹ First, many of the claims made by the Debtor are not state law claims. The Debtor's claims for violations of RICO, TILA and discrimination (which is also based upon TILA) all arise directly from federal law. Second, the Court finds the federal court would have jurisdiction to hear this case even without the bankruptcy, as the majority of the claims involve a federal question,²⁰ and the remaining claims

¹⁵See *Lindsey v. O'Brien, Tanaski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482, 497 (6th Cir. 1996).

¹⁶*Nationwide Roofing & Sheet Metal, Inc. v. Cincinnati Insurance Company (In re Nationwide Roofing & Sheet Metal, Inc.)*, 130 B.R. 768, 778 (Bankr. S.D. Ohio 1991).

¹⁷*In re Hillsborough Holdings Corp.*, 123 B.R. 1004, 1010 (Bankr. M.D. Fla. 1990)

¹⁸28 U.S.C. § 1334(c)(2).

¹⁹The Court notes that Option One failed to address any of the factors necessary to make a determination that abstention is appropriate. As a result, the Court is unable to make any findings on several of the elements where the evidence relating to those factors is not apparent in the record. For example, the Court is unable to determine the status of the state court action that may involve these claims, if the same claims were brought in the state court action as original claims or counterclaims, or whether such claims could be timely adjudicated in state court. However, because the Court finds that the record does contain sufficient information to determine that two of the required elements are lacking, the Court does not need to make a finding as to the remaining elements.

²⁰See 28 U.S.C. § 1331 (providing “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”).

would fall under the court's supplemental jurisdiction.²¹ Because this proceeding is not based solely upon state law claims, and because the federal courts would have jurisdiction to hear this case even without the underlying bankruptcy, mandatory abstention is not appropriate under § 1334.²²

III. CONCLUSION

The Court finds that it has jurisdiction to hear this matter, and that this adversary proceeding will continue in this Court. The claims brought by the Debtor, although not core proceedings, are clearly related to the Debtor's bankruptcy. Therefore, the Court has jurisdiction to hear those claims pursuant to 28 U.S.C. § 157(c)(1). In addition, mandatory abstention pursuant to 28 U.S.C. § 1334(b) is not appropriate in this case because the Debtor's claims are based, at least in part, upon federal law, and the claims could have been brought in federal court even without the underlying bankruptcy.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Option One Mortgage Corp.'s Motion to Abstain from Hearing and to Dismiss Debtor's Adversary Case as is a Non-Core Proceeding (Doc. 61) and Defendants Miller Enterprises, Inc. and Jeffrey Miller's Motion to Abstain from Hearing and to Dismiss Debtor's Adversary Case are denied.

This Court stayed discovery in this case pending resolution of this motion, and until the Court could review various Defendants' dispositive motions. A quick review of the motions leads this Court to believe that they raise serious questions going to the merits of this suit. As a result, this Court believes it is

²¹See 28 U.S.C. § 1367(a) (providing "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution").

²²Option One has not provided any argument or evidence relating to permissive abstention, but instead appears to rely solely upon mandatory abstention in its motion.

appropriate to continue the stay of discovery in this case until the Court can issue a ruling on these dispositive motions.

IT IS SO ORDERED this ____ day of May, 2004.

JANICE MILLER KARLIN
United States Bankruptcy Judge
District of Kansas

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the Memorandum and Order Denying Motion to Abstain, and Continuing Stay Order was deposited in the United States mail, prepaid on this _____ day of May, 2004, to the following:

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